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1. The first part of the report is a general
description of the project and its objectives.
2. The second part is a detailed description of
the methods used in the study.
3. The third part is a description of the results
of the study.
4. The fourth part is a discussion of the results
and their implications.
5. The fifth part is a conclusion and a list of
references.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

v.

**TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit (R. 104-121) is reported at 317 F. 2d 796; the orders of the Federal Power Commission are reported at 28 FPC 551 and 29 FPC 378 (preliminary prints).

JURISDICTION

The judgment of the court of appeals setting aside the Commission's orders was entered on May 20, 1963 (R. 122). The petition for a writ of certiorari was filed on August 19, 1963, and granted on November 12, 1963 (R. 123). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. The Federal Power Commission summarily rejected applications for certificates of public convenience and necessity filed by respondent gas producers because they were based upon contracts containing price-changing provisions of a kind which the Commission had proscribed by regulation as contrary to the public interest.

The question presented is whether the Commission may exercise its rule-making power to refuse to consider applications for certificates for new supplies of gas under contractual arrangements (including spiral escalation clauses, favored-nations provisions and other types of indefinite pricing) which it finds are incompatible with the public interest.

2. Section 19(b) of the Natural Gas Act provides that review of a Commission order may be obtained by an aggrieved party in the court of appeals for the circuit "wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." Respondent Texaco claimed only that it was located in the Tenth Circuit.

The question presented is whether a natural gas company, for venue purposes, may be "located" outside the State of its residence, i.e., outside the State of incorporation.¹

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001-1011, the

¹ Question 2, which was reserved in the petition (p. 2, note 1) relates only to respondent Texaco.

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, and of the Commission's regulations, as amended, 18 C.F.R. (Cum. Supp. 1963), are set out in the Appendix, *infra*, pp. 51-62.

STATEMENT

The challenged regulations.—The decision below invalidates regulations of the Commission proscribing certain price-changing provisions—such as “favored nation,” price-redetermination, and “spiral escalation” clauses—in independent producer sales contracts. Thus, the court of appeals has set aside two orders of the Commission which rejected, out-of-hand, producer applications for certificates of public convenience and necessity for new sales of natural gas under contracts concededly forbidden by the agency's regulations because of their pricing provisions.

The Commission's Regulations under the Natural Gas Act, Section 154.91 *et seq.*, as amended, 18 C.F.R. (Cum. Supp. 1963) 154.91 *et seq.*, relating to producer rates, provide that independent producers subject to the agency's jurisdiction shall file their contracts as rate schedules. Section 154.93 defines pricing provisions that are permissible, declaring others to be inoperative and of no legal effect:

* * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, *any provision for a change of price other than the following provisions shall be inoperative and of no effect at law*; the permissible provisions for a change in price are:

(a) Provisions that change a price in order

to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings and, are in the area of the price in question * * *. [Emphasis supplied.]

This language originated in Order No. 232, issued March 3, 1961 (R. 12-17, 25 FPC 379, 26 Fed. Reg. 1983), as amended by Order No. 232A, issued March 31, 1961 (R. 18-21, 25 FPC 609, 26 Fed. Reg. 2850).

The same section (154.93) of the present producer rate regulations further provides that "any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions" described above "shall be rejected"; similarly, Section 157.25, relating to producer certificates, provides that an independent producer application for a certificate of public convenience and necessity "shall be rejected" if any contract submitted in support of it contains any of the forbidden provisions; and Section 157.14(a)(10)(v), relating to pipeline certificates, provides that any producer contract executed after April 2, 1962, which has this infirmity, "will be given no consideration in determining adequacy" of a pipe-

line company's gas-supply showing in support of a certificate application. These three implementing provisions were added to the regulations by Order No. 242, issued February 8, 1962 (R. 22-25, 27 FPC 339, 27 Fed. Reg. 1356).

History of the regulations.—Even before the *Phillips* decision,² the need for general regulations to deal with the problem of indefinite price-changing provisions in producer contracts had been recognized. On May 12, 1954, the Commission had initiated a rule-making proceeding³ to determine whether such clauses⁴ "have any reasonable relation to the economics of producing, gathering, or transporting natural gas, and whether rules dealing therewith should be adopted." Particular reference was made to the possibility of adopting a rule "in connection with the issuance of certificates" declaring contracts containing such provisions "not to be acceptable as evidence of gas supply, or in connection with rate-making⁵ whereby increased payments made under escalator provisions but having no relation to additional or improved service or gas supplies to an interstate transporter could be disallowed."

² *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (June 7, 1954).

³ 19 Fed. Reg. 2768.

⁴ The various kinds of indefinite pricing clauses are described *infra*, p. 15, note 14.

⁵ At that time, preceding the *Phillips* decision, the only certificate or rate proceedings that were being held were those relating to pipelines.

In December, 1954, this rule-making proceeding eventuated in a provision stating (Order 174B, 13 FPC 1576, 18 C.F.R. 157.25):

* * * Escalation clauses in contracts submitted hereunder on or after May 1, 1955, will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) Provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

In 1956, the Commission initiated another rule-making proceeding looking to the adoption of a rule that would bar all new producer contracts containing indefinite pricing clauses. The notice was published in the Federal Register on April 12, 1956 (21 Fed. Reg. 2388) and mailed to interested parties including State and regulatory agencies (R. 12, 25 FPC at 380). In the notice (21 Fed. Reg. 2388), the Commission announced that it proposed to amend its regulations governing independent producers by designating certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules. Specifically, it proposed to reject contracts containing provisions calling for price adjustments keyed to "(a) escalator clauses based on price indices or changes in the price received by the purchaser upon resale ["spiral clauses"], or (b) the payment or offer of payment of higher prices by the

purchaser or other purchasers in the same or other producing areas to the same or other sellers ["favored-nation" and price redetermination clauses]."

The notice invited comments on or before June 1, 1956 (21 Fed. Reg. at 2389). Nearly eighty responses, including comments from the present respondents, Texaco and Pan American, were received by the Commission, some supporting and some opposing the proposed rule.*

Nothing was decided in that rule-making proceeding, however, until the question of the lawfulness of indefinite pricing provisions was raised and tried in the *Pure Oil* case. That case arose out of increased rates tendered for filing in January 1959 under the claimed authority of favored-nation clauses and decided March 3, 1961, *Pure Oil Co.*, 25 FPC 383, ^{was} affirmed, 299 F.2d 370 (C.A. 7).¹ The same day it issued its decision in that case, the Commission issued Order No. 232 (R. 12-17, 25 FPC 379) in the rule-making which it had initiated in 1956.

In Order 232, the Commission found (R. 13) that long-term gas supply contracts containing "indefinite escalation clauses" (which it defined as all price es-

* At the time of making these comments, the names of the companies were The Texas Company and ~~Standard~~ ^{Standard} Oil and Gas Company, respectively. For convenience of the Court, respondents' comments in this and subsequent rule-making proceedings have been excerpted from the administrative record and lodged with the Clerk.

¹ While that case was decided on the ground that the favored-nation clause there involved had not been triggered, the Commission, as stated in Order No. 232, explained there why it regarded indefinite escalation clauses to be contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, 387-391.

calation provisions other than those calling for increases of specific amounts at definite dates or those intended to reimburse the seller for all or any part of changes in production, severance or gathering taxes levied on the seller) "have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies," and, for the reasons elaborated in *Pure Oil*, were contrary to the public interest. Accordingly, it amended the producer rate regulations by adding (1) the definitions of "definite" and "indefinite" escalation clauses to Section 154.91 of the regulations and (2) the proviso to Section 154.93, declaring that any provision for a change of price based on an indefinite escalation clause in a contract filed on or after April 3, 1961, would be "inoperative and of no effect at law" (R. 14, 25 FPC at 381).

Order 232 also provided that the amendments to the regulations therein promulgated would become effective on April 3, 1961, and that any interested person could submit written views or comments to the Commission by March 20, 1961, R. 14, 25 FPC at 381. On March 31, 1961, the Commission, upon consideration of more than thirty further comments, including those of Texaco and Pan American, issued a modification, designated Order 232A. In this order, the Commission found that it "appears that elimination of all indefinite escalation provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-

term contracts, we should permit future contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and therefore, controlled)" (R. 19). It also concluded that the amendment to the regulations should apply only to contracts "executed" on or after April 3, 1961 (under Order 232 the amendment would have applied to contracts "filed" on or after that date, whenever executed)."

Order 242 (which put the rule in its present form) was initiated in October 1961—again by a notice of proposed rule-making (26 Fed. Reg. 9732) and the mailing of notices to interested persons, including natural gas companies and State and federal agencies (R. 23, 27 FPC 339). In that notice, the Commission stated (26 Fed. Reg. 9732, 9733):

Having found in Order No. 232A that indefinite escalation provisions " * * * are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies * * * ", it appears that no useful purpose can be served by the Commission's acceptance of contracts containing indefinite price escalation provisions or of applications relying upon contracts having such

* A petition to review Order Nos. 232 and 232A was dismissed for lack of jurisdiction. *Sun Oil Co. v. Federal Power Commission*, 304 F. 2d 293 (C.A. 5), certiorari denied, 371 U.S. 861.

provisions as proof of the applicants' gas supply.*

Following receipt of thirty-six responses, again including comments from Texaco and Pan American, the Commission, on February 8, 1962, issued its order (R. 22-25, 27 FPC 339) explaining that indefinite price-changing provisions hamper effective rate regulation, and that the existing regulation and the new amendments were necessary to remove a serious impediment to the performance of the Commission's statutory duties.⁹

The present cases.—On the basis of its regulations, the Commission rejected applications of respondents Texaco and Pan American for certificates of public convenience and necessity because they depended upon

*The specific amendments proposed were substantially the same as those eventually adopted in Order 242, except that the proposed regulations would have rejected rate schedules or certificate applications filed after the specified date, rather than only those executed after the specified date.

⁹A number of producers including Pan American, filed applications for rehearing of Order 242. After these were denied on April 4, 1962 (27 FPC 666), six petitions for review of that order were filed. Each of these has now been dismissed on motion of the Commission, three in the Fifth Circuit (*Hunt Oil Co. v. Federal Power Commission*, 306 F. 2d 878), one in the Third Circuit (*Shell Oil Co. v. Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962, unreported), and two by the part of the opinion of the Tenth Circuit in this case relating to C.A. 10 Nos. 7002, 7119 (R. 112-114). The Tenth Circuit held that those petitioners were not "aggrieved" within the meaning of Section 19(b) of the Gas Act, pointing out that the "statute is strained if review may be had of a negative order of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner." R. 114. Pan American is challenging that dismissal in *Pan American Petroleum Corp. v. Federal Power Commission*, No. 237, this Term, now pending on petition for certiorari.

contracts containing impermissible price-changing provisions.¹¹ In their applications for rehearing (R. 65-69, 91-98), respondents challenged the validity of the regulations. Neither company denied that its contract contained an impermissible price-changing clause (as therein defined); and neither requested a waiver of the regulations, as permitted by Section 1.7(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. (Cum. Supp. 1963) 1.7(b), *infra*, p. 60.

The court below (in its Nos. 7217 and 7303) set aside the Commission's orders, holding (R. 120-121) that the "summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review."¹²

In No. 7217, the court also denied the Commission's motion to dismiss for lack of venue, which alleged that Texaco was not "located" in the Tenth Circuit within the meaning of Section 19(b) of the Gas Act, *infra*, p. 58. The Commission had contended that under Section 19(b), which permits a petition for review of a

¹¹ By letter order of October 5, 1962, in Docket No. CI63-289, to Texaco (R. 63-64) and letter order of February 19, 1963, in Docket No. CI63-367, to Pan American (R. 89-90).

¹² A Commission order rejecting a certificate application based on a contract containing price-changing provision proscribed by the same regulations was affirmed by the Ninth Circuit in *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601, pending on petition for certiorari, No. 680, this Term.

Commission order to be filed in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," a corporation is "located" only in the State in which it is incorporated. Rejecting this, the court held that a company's location depends upon the facts of the case with respect to the business done within the circuit. Explaining its conclusion that venue existed, although Texaco did not have its "principal place of business" in the Tenth Circuit, the court explained that Texaco "conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein," and "[m]ore importantly, in each of the cases [""] the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit" (R. 112).

SUMMARY OF ARGUMENT

I

Faced with the fact that indefinite pricing provisions in contracts for the sale of gas (including favored-nation and spiral escalation clauses) were generating a flood of rate filings apparently unrelated to the legitimate economic needs of producers and that these were clogging the processes of regulation, the Federal Power Commission adopted rules specifying for the future the types of price-changing provisions which it would regard as acceptable (proscribing all others). It provided further that applications for

¹³ Texaco had filed three petitions for review, but two were dismissed for lack of jurisdiction. The Commission had also challenged venue in each of those cases on the same grounds.

certificate authority (the occasion for this litigation) and filings for rate increases would be rejected if grounded upon contracts containing provisions of the proscribed types.

The court below has not reviewed the reasonableness of the FPC rules but has concluded that the Commission lacked power to proceed by resort to rule-making, notwithstanding a broad statutory grant of authority to promulgate general rules "necessary or appropriate to carry out the provisions" of the Natural Gas Act.

The fundamental objection, in the view of the court below, is that the substantive sections of the Act defining the Commission's powers of certification and rate-making affirmatively provide for a hearing. Provision for a hearing, however, does not preclude an agency from particularizing statutory standards and barring at the threshold those who concededly do not meet the prerequisites and fail to suggest any consideration which would conceivably justify a waiver of them. As held by this Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, involving an analogous situation under the Communications Act, there is no deprivation of the right to a full hearing when, on the agreed facts, the standard embodied in the rule is unsatisfied; in that circumstance, there are no further facts to ascertain.

Nor is there force to the argument that, in the absence of an adjudicatory proceeding, there is no adequate record for purposes of court review. To begin with, a general rule within the scope of an agency's authority enjoys the presumption of validity

which attaches to a statute. Moreover, the administrative record made in the rule-making proceeding (which fully complied, in this instance, with the requirements of Section 4(b) of the Administrative Procedure Act) provides basis here, no less than it did in *Storer*, for a determination whether the regulations have rational foundation.

As to the substantive authority of the Commission (as distinguished from the question whether it was obliged to proceed case-by-case rather than by rule), there can be no question. Under Sections 4 and 5 (the rate-making sections), the Commission has specific authority to modify contracts affecting rates. Its authority under Section 7 is surely no less, for in exercising the power of certification the Commission is bound to give effect to all provisions of the Act. Since the protection of consumers is the touchstone of the statute, contracting practices which bear on the applicant's future rates assume particular importance in the Commission's determination of the public convenience and necessity.

II

The Court of Appeals also erred in failing to dismiss Texaco's petition for lack of venue. Under Section 19(b) of the Natural Gas Act, a person aggrieved may seek review in the circuit "wherein the natural-gas company to which the order relates is located or has its principal place of business" or in the District of Columbia. Texaco is a Delaware corporation and there is no claim that its principal place of business is within the Tenth Circuit. All indicia point to the conclusion that Congress used the term "located," as

it appears both in the Power and Gas Acts, in the sense that it is traditionally used in venue provisions—as specifying residence or domicile. In the case of a corporation, this means the State in which the company is incorporated.

ARGUMENT

INTRODUCTION

Without reaching the question of the reasonableness of the Commission's indefinite-pricing regulations, the decision below held them invalid on the ground that the subject is one the Commission cannot deal with by general rule but must decide case by case. While we shall, therefore, not discuss their reasonableness, we think it will be helpful to set the regulations against the background of the problems which led to their promulgation.

Indefinite pricing clauses—contractual provisions characteristically designed to move the producer's price to the highest prevailing level—came into

“Such clauses are of several kinds. “Favored-nation clauses” provide for increases whenever a higher price is paid to any other supplier by the same purchaser (“two party”), or by any purchaser (“three party”). “Redetermination clauses” generally provide that the producer's price shall be raised at specified times to reflect the average of the highest prices then being paid. Other similar types include “bona fide offer” type of “favored-nation clauses”, “commodity-index-adjustment clauses”, and “renegotiation clauses”. See *Pure Oil Co.*, 25 FPC 383, 388. A different and less prevalent form of indefinite pricing clause is the “spiral clause,” such as was under consideration in *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 301, note 9; see 24 FPC 537, 576-7, 593, 756-7. Spiral clauses generally provide for increases in producers' rates in proportion to increases in the pipeline's rates.

widespread use during the "sellers' market" for natural gas which accompanied the post-war proliferation of pipelines." It was not, however, until the eve of the *Phillips* decision¹⁴ (ruling that the Commission has power to regulate the rates of independent producers) that their prevalence evoked the first expression of Commission concern." By the time that this Court had settled the Commission's responsibilities in the realm of producer rates the flood of increased rate filings (to which the indefinite pricing clauses greatly contributed) was already at high crest.

¹⁴ See, e.g., *Hearings on Natural Gas Act (Exemption of Producers) before House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess., p. 538; 96 Cong. Rec. 4022-4028; Neuner, *The Natural Gas Industry* (1960), p. 80-111. Both reports made in 1948 on the Commission's Natural Gas Investigation, G-580, note the existence up to that time of a "buyers' market" for natural gas. Smith-Wimberly Report, p. 185-188, Olds-Draper Report, pp. 136-137. The sharp rise in the rate of increase in interstate transmission of natural gas beginning in 1947 (see F.P.C. Annual Report, 1954, p. 21) was shortly followed by a corresponding rise in prices. While the 1949 F.P.C. Annual Report (p. 14) spoke of "declining prices," the 1950 Report (p. 2) noted "several requests for rate increases," and the 1951 Report (p. 2) "a continuation of the upward trend in wholesale prices of natural gas which commenced during the previous fiscal period." The rise became "precipitous" until prices leveled off in 1961 (F.P.C. Annual Report, 1962, pp. 84-85).

¹⁵ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, decided June 7, 1954.

¹⁶ *Supra*, pp. 5-6; F.P.C. Annual Report, 1954, p. 109. In 1955, 735 producer rate increases under escalation (including fixed periodic escalation clauses as well as indefinite pricing clauses) and renegotiation clauses were filed. F.P.C. Annual Report, 1955, pp. 109-110. By 1960 the number had risen to 2,307. F.P.C. Annual Report, 1960, p. 78.

A number of factors entered into the problem confronting the Commission. To begin with, the timing of increased rate filings under indefinite pricing clauses is often determined by fortuitous circumstances quite unrelated to the producer's economic need, *e.g.*, that another producer has made a sale at a high price (R. 24).

Indefinite pricing provisions impair the Commission's fulfillment of its certificate obligations as well as its rate-making responsibilities. Consideration of initial prices in certificating producer sales, as required by *CATCO*,¹⁸ will be of limited efficacy if the Commission is unable to ascertain when the producer will be able to file for an indefinite increase. And where a proposed construction or enlargement of a pipeline depends for any substantial percentage of its gas on contracts containing such clauses it is virtually impossible for the Commission to estimate its economic feasibility, for there is no predictable ceiling upon the cost of supply.

The interacting and cumulative effect of such contracts compounds the problem. When many contracts in a given area contain "indefinite" clauses, a single out-of-line new price (or increase under a spiral clause) can start a chain reaction throughout the area (R. 24).

Another serious factor is that the Commission often must determine whether the alleged triggering transaction does in fact authorize the tendered increase. See *United Gas Pipe Line Co. v. Mobile Gas Service*

¹⁸ *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378.

Co., 350 U.S. 332. These questions of contract interpretation are themselves complex and productive of regulatory delay. In one such case, seven years elapsed between the date of the tender of the rate for filing (Nov. 14, 1954), and the close of the review proceedings in the courts (Nov. 24, 1961).¹⁹ Thirty-eight other filings tendered four years ago have only recently been argued in the Third Circuit.²⁰ These delays in turn hold up disposition of proceedings involving other increased rates submitted under indefinite pricing clauses claimed to have been triggered by the rates in the delayed cases.

In short, the uncertainty and instability generated by indefinite pricing demanded a mechanism of con-

¹⁹ *Shell Oil Co.* 18 FPC 617, 19 FPC 74, set aside *sub nomine Shell Oil Co. v. Federal Power Commission*, 263 F. 2d 223 (C.A. 3), reversed *sub nomine Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263; on remand, affirmed *sub nomine Shell Oil Co. v. Federal Power Commission*, 292 F. 2d 159 (C.A. 3), certiorari denied, 368 U.S. 915.

²⁰ *Shell Oil Co., et al.*, 29 FPC 498, petitions for review pending: *Shell Oil Co. v. Federal Power Commission*, C.A. 3 No. 14431, *Sun Oil Co. v. Federal Power Commission*, C.A. 3 No. 14434, *Hunt Oil Co. v. Federal Power Commission*, C.A. 3 No. 20526, transferred, C.A. 3 No. 14506, *Superior Oil Co. v. Federal Power Commission*, C.A. 3 No. 20521, transferred, C.A. 3 No. 14507.

See, also, *Warren Petroleum Corp. v. Federal Power Commission*, 282 F. 2d 312 (C.A. 10); *Kerr-McGee Oil Industries, Inc. v. Federal Power Commission*, 260 F. 2d 602 (C.A. 10); *Cities Service Gas Producing Co. v. Federal Power Commission*, 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911.

trol—one which would be prompt and comprehensive and avoid a threatened breakdown of regulation.²¹

I

THE COMMISSION'S REJECTION OF THE CERTIFICATE APPLICATIONS ON THE BASIS OF ITS GENERAL REGULATIONS WAS A PROPER EXERCISE OF THE RULE-MAKING AUTHORITY

A. THE PROHIBITION OF INDEFINITE PRICING CLAUSES WAS AN APPROPRIATE SUBJECT OF GENERAL REGULATION

Section 16 of the Natural Gas Act vests the Commission with broad authority to issue such rules of general applicability "as it may find necessary or appropriate to carry out the provisions" of the Act. Relying upon that power, the Commission has stated that it will reject certificate applications (and also rate filings) based upon contracts which include certain types of proscribed price-changing provisions. The court below has ruled that this may not be done. Its opinion suggests (1) that resort to rule-making, rather than case-by-case adjudication, may impinge upon producers' substantive rights, (2) that the hearing requirements of the Act preclude rules of the kind

²¹ While attempting to provide an effective remedy, the Commission was careful not to limit the level of prices that may be contracted for or charged, or the number of times a producer may seek to increase a particular rate. Nor did it preclude a producer from selling under a short-term contract, at the termination of which it would be free to file rate changes (see *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 155) or negotiate a new contract. See, e.g., *Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170. Finally, it did not prohibit renegotiation of an existing contract, although it did bar contract provisions compelling "renegotiation".

here in question, and (3) that the rule-making process does not permit effective judicial review of the underlying issues which are at stake. We consider these points in turn.

1. There is no substance to the suggestion of the court below that the Commission, by using its rule-making power to implement the public convenience and necessity standard of Section 7 (or the just and reasonable standard of Sections 4 and 5) has denied the producers a substantive "right to contract" (R. 113, 121), in derogation of the principle that the Commission may only "review", not "make", contracts.

As we discuss more fully, *infra*, pp. 33-38, the Commission would certainly be free under Section 7 to deny an application for a certificate on the ground that it was based on contract provisions found incompatible with the present or future public convenience and necessity. Alternatively, the Commission could grant a certificate in such circumstances on condition that the objectionable contract provisions be eliminated. And the Commission could modify a contract affecting a rate subject to its jurisdiction, if that were necessary to make it just and reasonable (*infra*, pp. 32-33). In any such case, the Commission would merely be reviewing a contract made by the company to determine whether it meets the statutory test.

Application of the Commission's present regulations affects a producer's "right to contract" no more than would such a case-by-case determination. In choosing to proceed by promulgation of a rule of general applicability the Commission has not prevented producers from entering into contracts on whatever

terms they can obtain any more than if it followed a case-by-case approach. For the rule has merely made it plain that only under exceptional circumstances—which can be brought to the Commission's attention in a request for a waiver of the rule—will it grant certificates for sales under contracts of the proscribed kind.

The Tenth Circuit's decision that the Commission may proscribe contract clauses not conforming to the standards of the Act only on a case-by-case basis would have the effect of requiring the Commission to repeat, in hearing after hearing, conclusions which apply equally to all of the indefinite price-changing provisions with which its regulations deal. Such proliferation of hearings cannot fail to inflict serious damage upon the processes of regulation where, as here, there are hundreds, or thousands, of individual producers involved, with no significant variations in the problems presented by their several situations; where the burden on the individual producer of the case-by-case approach would be, for most of them, as disproportionate to their interests as it would be unreasonably costly for the Commission; and where the very interacting and cumulative effect of such clauses in large numbers of contracts greatly compounds the problem calling for remedy.

As this Court has stated, the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency". *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 203. In view of the circumstances

described, we submit that it was plainly a sound exercise of the Commission's discretion to give concreteness to the statutory standards by resort to its general rule-making powers under Section 16 of the Natural Gas Act.

2. Aside from the alleged deprivation of a substantive right, the decision below rests principally on the court's view that the Commission may not summarily reject a certificate application because Section 7 calls for hearing prior to Commission action on such an application. But, as the Ninth Circuit has recently noted in a case involving the identical issue,²² this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, provides a complete answer.²³

In *Storer*, the Federal Communications Commission, pursuant to its general rule-making authority, issued an order amending its multiple ownership rules for radio and television stations. Storer, a broadcaster whose ownership of seven standard radio and five television stations constituted, under the amended rules, an automatic disqualification for further licensing, challenged the rules in the court of appeals on the ground that they were in conflict with Section 309 of the Communication Act, 47 U.S.C. 309, requiring (a) that a license be granted where the public interest would be served, and (b) that a hearing be held before denial of an application. The court of

²² *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601, pending on petition for certiorari, No. 689, this Term.

²³ The court below failed to discuss *Storer*, although the bearing of that case had been extensively argued both orally and in the briefs, and the court cites the case in a different connection (R. 113, 317 F. 2d at 803).

appeals invalidated the general order, holding (220 F. 2d 204, 208) that "any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." "

In this Court, the Communications Commission argued, as the Power Commission does here, that rules may validly give concreteness to a standard of public interest; that the right to a hearing does not apply where an applicant admittedly does not meet those standards since there would be no further facts to ascertain; and that the agency's regulations afforded applicants an opportunity to allege exceptional circumstances which might, in individual cases, warrant waiver of the rules (351 U.S. at 201). This Court agreed, reversing the decision below upon the following analysis (351 U.S. 202-203, 205):

We do not read the hearing requirement * * * as withdrawing from the power of the Com-

"The court of appeals went on to explain (220 F. 2d at 208-209):

* * * [T]he Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances² may differ widely from case to case. * * *

It is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public convenience, interest or necessity." * * *

mission the rule-making authority necessary for the orderly conduct of its business. As conceded by Storer, "Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest." The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rule-making authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law.

• • • We read the Act and Regulations as providing a "full hearing" for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), n. 5, *supra*, would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is

aggrieved by a refusal, the way for review is open."

See, also, *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190; *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 289, note 7; *American Trucking Associations, Inc. v. United States*, 344 U.S. 298; *Transcontinent Television Corp. v. Federal Communications Commission*, 308 F. 2d 339 (C.A.D.C.); *Logansport Broadcasting Corp. v. United States*, 210 F. 2d 24 (C.A.D.C.).

As the Ninth Circuit found in the *Superior* case (322 F. 2d at 612-613), there is no significant difference between the statute involved in *Storer* and that involved here so far as the hearing requirements and rule-making authority are concerned. In *Storer*, as here, the challenged rule dealt with substantive standards rather than procedure. Moreover, the rules of the Power Commission (Section 1.7(b) of the Commission's rules, *infra*, p. 60), like those of the Communications Commission, permit applicants to seek amendment, waiver, or repeal of its rules and, when reasons are set forth sufficient on their face to provide a basis for such relief, entitle them to a hearing. Similarly, they would have been granted an adjudicatory-type hearing if at any point they had raised any substantial issue as to the applicability of the regulation in the particular circumstances. See *Atlantic*

* In *Denver Union Stock Yard Co. v. Producers' Livestock Marketing Association*, 356 U.S. 282, this Court reiterated the view that Congress does not intend to require a hearing when no purpose would be served.

Refining Co., 28 FPC 469, order of September 13, 1962, granting rehearing of rejection order."

Neither respondent has ever asserted, however, that the regulation, if valid, would not cover, or for some reason ought not be applied to, the escalation clauses in its contract. And the Natural Gas Act does not require, any more than did the provisions of the Communications Act involved in *Storer*, a full evidentiary hearing in each case merely to redetermine the wisdom of the agency's general rule or to re-appraise the "legislative facts" on the basis of which that rule was adopted. As Judge Learned Hand stated (*National Broadcasting Co., Inc. v. United States*, 47 F. Supp. 940, 945 (S.D. N.Y.), affirmed, 319 U.S. 190):

* * * Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in

"In another case, the Commission has granted rehearing to consider whether the regulations here at issue should be modified to permit escalation clauses in producer contracts which allow producers to change the price under a particular contract at will, subject only to Commission regulation. *Atlantic Refining Co.*, 29 FPC 384. In granting rehearing, the Commission explained that, while such a provision was clearly prohibited by its regulations, "the propriety of such a provision, which is not typically found in contracts between independent producers and pipelines, was not a matter which engaged the Commission's consideration at the time it adopted its present rule."

one instance, would in any event become a precedent for the future."

See, also, *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194; 1 Davis, *Administrative Law Treatise* (1958), pp. 407-411.

3. The Court of Appeals states further (R. 119-121) that, in the absence of "adversary hearings", there can be no effective judicial review. As the Ninth Circuit pointed out in the conflicting *Superior* decision, 322 F. 2d at 619, the Tenth Circuit's approach would require "all general rule-making to include a trial-like hearing."

There is, of course, no constitutional right to a hearing where the subject is legislation or general rule-making. See *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441; *Bowles v. Willingham*, 321 U.S. 503, 519-520. Moreover, the Administrative Procedure Act does not call for an evidentiary hearing. Section 4(b) requires that substantive rules of general applicability should be promulgated after notice and opportunity by interested persons to submit comments, data and views. This was the procedure concededly followed here, as it was in *Storer*. And certainly in *Storer* this Court found no obstacle

²⁷ The Commission's regulations permit rate filings to be made simultaneously with applications seeking certificate authorization. Such rate filing is obviously dependent upon the issuance of certificate authority and may be rejected if the certificate application is rejected. See *W. J. Dillner Transfer Co. v. United States*, 214 F. Supp. 941 (W.D. Pa.).

Moreover, rejection of unauthorized rate filings without a hearing is also firmly established. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 322, 347; *Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170.

to judicial review of the reasonableness of the Federal Communications Commission's multiple ownership rules.²⁸ See, also, *Public Service Commission of New York v. Federal Power Commission*, C.A.D.C. No. 17673, decided January 2, 1964 (1956 rule prescribing standards for issuing temporary authorizations to producers found valid); *Transcontinent Television Corp. v. Federal Communications Commission*, 308 F. 2d 339 (C.A.D.C.) (rule-making record held to support rule);²⁹ *Functional Music, Inc. v. Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813 (stated justification held

²⁸ It is immaterial that in *Storer* it was the general order promulgating the rule which was under review, whereas here it is a subsequent order applying the rule. In either case, it is the underlying rule, either on its face or as applied, which is at issue; and in either event the court, in deciding that issue, may review the written views and comments submitted to the Commission in connection with the rule-making proceeding. Rules, like legislation, are frequently reviewed when applied. See e.g., *Public Service Commission of New York v. Federal Power Commission*, C.A.D.C., No. 17673, decided January 2, 1964; *Functional Music, Inc. v. Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.); certiorari denied, 361 U.S. 813; *Dyer v. Securities and Exchange Commission*, 266 F. 2d 33 (C.A. 8), certiorari denied, 361 U.S. 835. Indeed, until it is applied, the complaining party may have no standing to challenge the rule.

²⁹ In that case, the court held a company was not entitled to an evidentiary hearing before denial of renewal application where the renewal application was for a channel no longer available as a result of Commission rule-making proceedings. It explained (308 F. 2d at 343), "we bear in mind that we are concerned here only with the type of hearing required, not with the right to a hearing. The latter is conceded. Marietta was heard, though in accordance with rule making procedures. The Commission having considered and decided the deintermixture issue in the rule making proceedings should not be required to cover again the same ground. * * *

not to support rule); cf. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284.

The Tenth Circuit has failed to recognize that "where the regulation is within the scope of authority legally delegated, the presumption of the existence of the facts justifying its specific exercise" is no less applicable to an administrative rule than to a statute. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186. See, also, *Superior*, *supra*, 322 F. 2d at 619 (C.A. 9). Respondents' burden in challenging a rule is to show that "the Commission had no reasonable ground for the exercise of [its] judgment." *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 314.²⁰

B. THE REGULATIONS ARE NOT INVALID FOR LACK OF ADEQUATE FINDINGS OR BECAUSE OF INCONSISTENCY WITH SUBSTANTIVE PROVISIONS OF THE ACT

1. The Court of Appeals also held (R. 119) that the Commission's ultimate finding²¹ that the prescribed price-changing provisions are inconsistent with the "public interest" is legally insufficient to sup-

²⁰ The formal record in the instant cases does not include the written views and comments constituting the record in the rule-making proceedings which resulted in Commission Orders Nos. 232A and 242. The court of appeals was free, however, to take judicial notice of the public record or require the Commission to produce it if that had been deemed necessary to appraise the reasonableness of the rules under review.

²¹ It should be noted that, in issuing rules of general applicability, an administrative agency is not required to make formal findings but only to give "a concise general statement of their basis and purpose." Section 4(b) of the Administrative Procedures Act, *infra*, pp. 51-52.

port the rule because it is not cast in the statutory terms—"just and reasonable" (Section 4 and 5) and "public convenience and necessity" (Section 7). Although the statutory language was not parroted, it is nonetheless clear that the Commission's explanation of the reasons for the rule was directly responsive to the governing statutory standards. In *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 355, this Court observed that the validity, or the justness or reasonableness, of a contract depends upon whether it adversely affects the "public interest." See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344, 345; *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904. Indeed, in countless certificate proceedings, "public interest" has similarly been equated with "public convenience and necessity." See, e.g., *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24, 29, 30; *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 390-391, 392.

This Court rejected a similar contention only last term in *Wisconsin v. Federal Power Commission*, 373 U.S. 294. There the Commission had terminated a number of Section 4(e) proceedings without making a finding in *haec verba* that the increased rates in question were "just and reasonable." The Court, concluding that the basis for the termination had nevertheless been properly explained, observed that the contention as to lack of finding "goes to the form

and not the substance of what the Commission did." *Id.* at 305.

2. As noted earlier, there is some suggestion in the opinion below that the Commission has no power to formulate substantive rules with respect to provisions of contracts. Without doubt, the Commission lacks power to "make" contracts in the first instance. Nor in ordinary circumstances can it approve proposed rate increases which exceed the levels to which the contracting parties have agreed. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332;²² cf. *Federal Power Commission v. Sierra Pacific*

²² Although this Court did not have any question before it in *Mobile* of the Commission's power to carry out the substantive provisions of Sections 4 and 5 by a general regulation under § 16, Mr. Justice Harlan, writing for the majority, was careful to avoid any implication that the Commission lacked such power (350 U.S. at 344):

* * * [D]enying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. * * *

The issue in that case was only whether a natural gas company had the right to file an increased rate pursuant to Section 4(d) of the Act when its contract prohibited that filing. Since the Court held that the Act was not intended to prohibit private rate contracts, it concluded that a seller of natural gas could not invoke the provisions of the Act for the filing of increased rates so long as a contractual inhibition was present. The Court was concerned with the powers of the seller of natural gas, not with the power of the Commission. As we have seen, the Commission's paramount power was recognized and there is nothing in *Mobile* that in any way limits the express powers over contracts conferred by Section 4 and 5 of the Act. See also the Commission's brief in *Federal Power Commission v. H. L. Hunt, et al.*, No. 273, this Term, pp. 29-33.

Power Co., 350 U.S. 348. However, as passingly observed in the preceding discussion of the Commission's ability to proceed by rule, rather than case-by-case, we believe that there can be no question of the Commission's authority to modify (or require the modification of) contracts upon a determination that they fail to satisfy the statutory criteria. At this juncture, we undertake to demonstrate that this is true both under the rate-making provisions of the Act (Sections 4 and 5) and those which relate to the process of certification (Section 7).

(a). Section 5(a) of the Act provides that in passing on existing contracts affecting rates:

Whenever the Commission, after a hearing * * * shall find that any * * * contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable * * * contract to be thereafter observed and in force, and shall fix the same by order * * * [emphasis added].

Section 4(e) provides in turn that the Commission may make such orders with respect to a suspended "schedule" (which the Commission has defined as the contract²³) "as would be proper in a proceeding initiated after it had become effective," i.e., in a proceeding initiated pursuant to Section 5(a). See *United Gas*

²³ F.P.C., Regulations Under the Natural Gas Act, § 154.93 (18 C.F.R. 154.93). Section 16 of the Gas Act expressly authorizes such definitions.

Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 341."

(b.) It is no less clear that the Commission may require modification of contracts as a condition of granting a certificate under Section 7 (the situation directly involved in the case at bar). Indeed, under that section the Commission must give full effect to all provisions of the Act and the policies which they reflect. See, e.g., *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (CATCO); *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241; cf. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 215-220. In the CATCO case, this Court specifically held that Sections 7 (c) and (e) of the Gas Act require the Commission to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale of natural gas in interstate

"This power to modify contracts which was recognized by the Ninth Circuit in *Superior*, 322 F. 2d at 618, has also been given effect by other courts of appeals. Thus, in *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904, the court sustained a Commission order requiring United Gas Pipe Line Company to disregard a contractual obligation to provide Mississippi with all its natural gas requirements and to insert a take-or-pay clause in the contract. In *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60 (C.A. 6), certiorari denied, 350 U.S. 987, the court recognized the Commission's authority to free Panhandle of a contractual duty to supply Michigan Consolidated with a specified amount of gas.

commerce.²⁰ If a natural gas company does not find such terms and conditions acceptable to it, it is not, of course, compelled to initiate the proposed service (360 U.S. at 387).

Since the primary aim of the statute is "to protect consumers against exploitation (e.g., *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 147; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610), it is obvious that rate questions (including the terms of related contracts) may be crucially important in certificate proceedings. See, e.g., *CATCO*, *supra*, 360 U.S. 378; *United Gas Improvement Co. v. Federal Power Commission*, 248 F. 2d 817, 823 (C.A. 9), certiorari denied *sub nom. Superior Oil Co. v. United Gas Improvement Co.*, 365 U.S. 879 and *California Co. v. United Gas Improvement Co.*, 365 U.S. 881. To be sure, in the *CATCO* case this Court held that the Commission was not required to convert every certificate proceeding into a full-blown rate case. But this hardly suggests that the Commission ought not, to the extent

²⁰ Indefinite price-changing provisions, though in existence to a limited extent in 1938, when the Act was adopted, did not become common earlier than the mid-1940's. See *supra*, p. 16, n. 15. Thus, while allowing rates generally to be initiated by contract, Congress can hardly be charged with approving or even considering all types of contract provisions that might be developed. Moreover, by specifically granting the Commission power to find contracts unlawful pursuant to Section 5(a) of the Act, Congress recognized that the Commission, not Congress, should deal with the evils arising from specific contracting practices as the Commission should find necessary or appropriate. See *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 309-310.

feasible, give careful consideration to rate and contract matters in deciding whether to issue a certificate.

It is apparent that modifications in a rate structure or in the terms of service for a proposed sale (whether stated in a tariff or contract filed as a rate schedule) can be made as readily prior to the commencement of service as later. Indeed, in many instances, this can be done with less disruptive effect upon the parties, for at that time persons objecting to the modifications can still refuse to make or participate in the proposed service if the conditions required by the public interest are unacceptable to them.

The desirability of Commission examination of rates and contracts at the outset was specifically recognized by Congress when Section 7 of the Natural Gas Act was amended in 1942 to require certificates of public convenience and necessity prior to initiation of any new jurisdictional service.³⁰ At the same time, Congress also added Section 7(e), which prescribes the standards to be applied by the Commission in deciding if a proposed act or service should be authorized. The purpose of these amendments was explained by the House Committee on Interstate and Foreign Commerce in these terms (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2-3):

* * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and

³⁰ Prior to that time, certificates were required only if a company sought to enter a market already being served by another natural gas company.

adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension *at a time when such vital matters can readily be modified as the public interest may demand.* * * * [Emphasis added.]

The Senate Committee on Interstate Commerce made a similar explanation [S. Rep. No. 948, 77th Cong., 2d Sess., pp. 1-2]:

Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. *The characteristics of their rate structure could be studied.* * * * [Emphasis added.]

See, also, Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 5-6.

Apart from conditions with respect to proposed initial prices, the Commission has often found it necessary to require modification of tariff or contract provisions as a condition of granting certificates of public convenience and necessity. Its power to do so has been repeatedly sustained. *E.g., Florida Economic Advisory Council v. Federal Power Commission*, 251 F. 2d 643, 648 (C.A.D.C.), certiorari denied, 356 U.S. 959, affirming *Houston Texas Gas and Oil Corp.* 16 FPC 118 and 17 FPC 303 (condition requiring

elimination of cancellation provisions in transportation agreement); *Northern Natural Gas Co.*, 22 FPC 164, 174-175, 180, affirmed *sub nom. Minneapolis Gas Co. v. Federal Power Commission*, 278 F. 2d 870 (C.A.D.C.), certiorari denied, 364 U.S. 891 (certificate conditioned upon removal of clauses, permitting cancellation depending on price relationship of gas and competitive fuels, in gas purchase contracts upon which feasibility of pipeline project depended); *Transwestern Pipeline Co.*, 22 FPC 391, 394-395, modified on rehearing, 22 FPC 542 (minimum bill provisions of proposed tariff required to be modified); *Panhandle Eastern Pipe Line Co.*, 10 FPC 185²⁷ (conditions requiring inclusion of interruptible rate schedules in tariffs). *Trans-Continental Gas Pipe Line Co.*, 7 FPC 24, 38-40 (commencement of service conditioned upon filing of new tariff satisfactory to Commission because of disapproval of certain terms of service); *Alabama-Tennessee Natural Gas Co.*, 7 FPC 257²⁸ (commencement of service conditioned upon filing of tariff satisfactory to Commission). The alternative to imposition of appropriate conditions, i.e., outright denial of a certificate, has also been employed by the Commission to prevent an inferior "end use" of gas and possible future inflation of field prices as a result of sales not in themselves subject to the Commission's regulation. *Federal Power Com-*

²⁷ See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 232 F. 2d 467 (C.A. 3), certiorari denied, 352 U.S. 891, where a collateral attack on this condition was rejected by the court.

²⁸ Discussed and implemented in *Alabama-Tennessee Natural Gas Co. v. Federal Power Commission*, 203 F. 2d 494 (C.A. 3).

mission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 23-25.

C. RESPONDENTS' FURTHER OBJECTIONS TO THE RULES ARE WITHOUT SUBSTANCE

We note briefly two additional objections to the Commission's regulations which were advanced by respondents in the proceedings below.

1. Respondents rely upon the fact that the courts, as well as the Commission, have hitherto given effect to increased rates predicated on indefinite escalation clauses of the type now proscribed. The short answer is that the legality *vel non* of a contract provision as a matter of general law does not control the question of the agency's power to prohibit such provisions in the exercise of its regulatory authority. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 416-418; *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 421-423. The only question for a court in passing on prohibitions embraced in the regulation is whether there is a reasonable basis for adopting the measure. In *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, where the approved regulations outlawed trip-leasing practices previously approved, this Court observed (344 U.S. at 314):

* * * The mere fact that a contrary position was taken during the war years when active interchange and leasing were required, that the Commission has never before restricted trip-leasing and has in fact approved it from time to time, does not change our function.

2. Respondents also seek comfort in the fact that the Commission, in its annual reports to Congress from 1956 through 1960, included among its numerous recommendations a request that such clauses be prohibited by statute. The effort to find significance in Congress' failure to legislate overlooks the facts (1) that the requested item was only one of a large package and (2) that it would have outlawed price escalation clauses in existing as well as future contracts, whereas the Commission regulation has prospective application only. As the Ninth Circuit commented in the *Superior* case (322 F. 2d at 618):

The Commission may well have had doubts about its power to strike such clauses from existing contracts, either by general rule or *ad hoc* decision, without having a like doubt about its power to promulgate a general rule outlawing such clauses only for the future. The fact that Congress was unwilling to set aside, by statutory fiat, existing price escalation clauses, has no tendency to establish that the Commission did not already have power to deal with the problem prospectively after administrative consideration of the respective merits of the various kinds of price escalation clauses.

II.

TEXACO'S PETITION FOR REVIEW SHOULD HAVE BEEN DIS-
MISSSED FOR LACK OF VENUE UNDER SECTION 19(b) OF
THE NATURAL GAS ACT

The court below also erred in failing to grant the Commission's timely motion (R. 72) to dismiss Texaco's petition for lack of venue. We recognize that this

Court could decide the questions relating to the Commission's rule-making authority without reaching the issue of venue, since Pan American's petition for review was properly brought in the Tenth Circuit and the decision below applies equally to Pan American and Texaco. However, a decision on the proper interpretation of the venue provisions will tend to limit "forum shopping" and avoid future litigation invited by the amorphous test adopted by the court below.

Section 19(b) of the Natural Gas Act provides that a party aggrieved by a Commission order may seek review in the court of appeals "for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." Respondent Texaco is incorporated in Delaware (R. 2). Its claim of venue was rested solely on its assertion (R. 2-4) that it is "located" in the Tenth Circuit. There was no allegation that Texaco has its "principal place of business" in that circuit; indeed its certificate application stated that "a principal place of business" was Houston, Texas (R. 27), i.e., in the Fifth Circuit.³⁰

³⁰ Similarly, in a petition for review previously filed in the Fifth Circuit on May 10, 1960 (*Texaco Inc. v. Federal Power Commission*, 290 F. 2d 149) Texaco alleged that venue was properly laid in the Fifth Circuit because it maintained its "principal place of business in relation to its production, gathering, and sales of natural gas at Houston, Texas." See also R. 109. Texaco had also previously sought to invoke the jurisdiction of the District of Columbia Circuit. *Texaco Inc. v. Federal Power Commission*, unreported, C.A.D.C. Nos. 17608, 17652, decided June 24, 1963, certiorari denied, 375 U.S. 941.

With respect to location, Texaco alleged that its Tulsa Division, one of seven divisions in its producing department, is responsible for production in the area including Oklahoma and Kansas; that the Tulsa Division operations include "the negotiations of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of State reports and the disposition of the production;" that the contract here at issue was negotiated by, and is under the supervision of, Tulsa Division personnel; and that the certificate applications involved here were made by that Division (R. 2-3, 109).

The court below concluded that Texaco was located in the Tenth Circuit because it conducted extensive operations in that Circuit and "[m]ore importantly, * * * the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit" (R. 112). In our view, these considerations are not decisive. As we read Section 19(b), a natural gas company is "located" only in the State of its incorporation, *i.e.*, its legal residence.

A. In rejecting the Commission's contention that "located" in Section 19(b) relates to a natural gas company's residence, *i.e.*, the State of its incorporation, the Court of Appeals relied principally (R. 110-111) on the fact that the legislative history of Section 313(b) of the Federal Power Act, from which Section 19(b) is derived, shows that "is located" was substituted for "resides," which appeared in an early draft of the bill. There is no indication, however, that this

change, which was incidental to another change of language, was designed to effect a change of meaning.

The first version of what ultimately became Section 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935) appeared in Senate Bill No. 1725, introduced in the first session of the Seventy-fourth Congress by Senator Wheeler. This bill provided that "Any person aggrieved by an order issued by the Commission in a proceeding under this Act to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein such person *resides* or has his principal place of business, or in the Court of Appeals of the District of Columbia . . ." (emphasis supplied). A revised bill, known as S. 2796, was referred to the Senate Committee on Interstate Commerce several months later. It contained the venue provisions now in Section 313(b), which modified the language of S. 1725 in two respects: (i) the reference point for venue is the "licensee or public utility" to which the Commission order relates, rather than the "person aggrieved"; and (ii) venue lies in the circuit where the utility "is located" rather than the circuit in which "such person resides." The former change was substantive; the latter, it would appear, merely stylistic." In the Gas Act, "licensee or public utility" became "natural

"We recognize, of course, that in provisions which lay venue on the basis of where a person resides, the term person includes both natural persons and strictly legal entities, such as corporations and, accordingly, that in those situations "resides" refers to corporations.

gas company". In making this language change from the personal to the impersonal, it was only natural to replace "resides" with "is located", since the most common impersonal entity, a corporation, "can have its legal home only at the place it is located by or under authority of its charter * * *." *Ex parte Schollenberger*, 96 U.S. 369, 377.¹¹ Since natural gas companies, public utilities, and licensees include business associations of varied types, both incorporated and unincorporated, it would be difficult, within the limits of felicitous drafting, to find a more precise phrase to denote the residence of a natural gas company than "is located."

B. In concluding that "is located" may relate to places other than a corporation's place of incorporation, the court below cited (R. 111) a dictionary definition to the effect that "[l]ocated" means having physical presence or existence in a place." It went on to say, however, that mere presence or "doing business" will not support venue under Section 19(b),

"Section 102(a)(2) of Delaware's General Corporation Law (Delaware Code Annotated (1953), Title 8, § 102(a)(2)) illustrates this same usage of "located in" for a corporation while "resident" is used for a natural person. That section calls for: "The name of the county and the city, town, or place within the county in which [the corporation's] principal office or place of business is to be located in this State, and the name of its resident agent; *which agent may be either an individual or a corporation.* In towns or cities of over 6,000 inhabitants the street and number of the principal office or place of business shall be stated, and the address by street and number of the resident agent shall be stated. Should the *resident agent not be a resident of, nor located in*, an incorporated town or city, then the hundred of its or his location or residence, and post-office address, shall be stated [emphasis added]."

relying, instead, on the fact that the transactions involved, i.e., the sale and the performance of the contract, were to occur within the Tenth Circuit. Under this test it is apparent that the location of a natural gas company would vary from case to case depending on where the sale occurs.⁴²

Such a concept is not only at odds with the usual meaning of the word "locate" as designating a fixed position,⁴³ but it reads into the Act a test which could easily have been made explicit had it been intended. In this respect, the Gas Act is in marked contrast with numerous regulatory statutes. For example, the Labor-Management Relations Act authorizes the review of Labor Board unfair labor practice order in the circuit "wherein the unfair labor practice in question was alleged to have been engaged in" or in which the alleged offender "resides or transacts business" (29 U.S.C. 160(f)). The same venue lies for enforce-

⁴² The court did not correctly state the "physical presence" test when it declared that a corporation has physical presence or existence in the State of its incorporation. It is common knowledge that many corporations maintain neither officers nor employees, but only a statutory agent, in the State of their incorporation. As the Second Circuit recently observed, the securing of a charter from a State may be a corporation's "sole connection" with that State. *Egan v. American Airlines, Inc.*, 324 F. 2d 565, 566. In such circumstances, while the corporation would be a "resident" of the State and subject to suit there, it could scarcely be said to have physical presence in the State.

⁴³ As the court notes (R. 111), "locate" means "[t]o designate the site or place of [and] * * * [t]o set or establish in a particular spot or position * * *". Webster's New International Dictionary (2d ed. 1958), to which the court referred, also states that locate means "[t]o place oneself; to take up one's residence; to settle; as be located in Ohio."

ment proceedings brought by the Board (29 U.S.C. 160(e)).⁴ It is notable that the venue provision of the Labor Relations Act was adopted on July 5, 1935, and the venue provisions of the Power Act (49 Stat. 860) on August 26, 1935. If, as the court below supposes, Congress intended to permit suits under the Power and Gas Act where the relevant transactions occurred, it obviously knew how to express that thought.

The alternative suggestion made by Texaco that a natural gas company is located wherever it is "doing business" was properly rejected below (R. 111). That construction would render superfluous the provision for venue in the circuit where the company has its *principal* place of business and run counter to the precept "that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent" (*McDonald v. Thompson*, 305 U.S., 263, 266). It is not lightly to be presumed that Congress' insertion of the words "principal place of business" was an exercise in redundancy.

C. It is of course traditional to attach great importance to the place of incorporation for federal venue purposes. Indeed, until the 1948 amendment of Section 1391 of the Judicial Code, 28 U.S.C. 1391 (c), the only "residence" of a corporation for purposes of venue in the federal district court was "the State and district in which it has been incorpo-

⁴ A petitioner for review is also granted the option, denied to the Board, to institute proceedings in the District of Columbia Circuit.

rated * * *. [T]he legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it." *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449-450. See also *Suttle v. Reich Bros. Construction Co.*, 333 U.S. 163. To be sure, statutes of recent vintage have frequently attributed significance to other connections (such as principal place of business or the place where a transaction occurs); but this is invariably by way of addition—not as a substitute for place of incorporation.

We note also that the corporation laws of most States require that every domestic corporation maintain a "principal office," a "principal place of business" and/or a "registered office"; the location is usually specified in the company's articles of incorporation. See, e.g., California General Corporation Law § 301; Delaware Code of 1953, Title 8, §§ 102, 131; District of Columbia Business Corporation Act, §§ 10, 47; Florida Statutes, §§ 608.03, 608.38; Illinois Business Corporation Act, § 157.11; Massachusetts General Laws, chapter 155, § 22; Michigan General Corporation Act, § 79; Missouri Revised Statutes, § 351.370; New Jersey Revised Statutes, §§ 14:2-3, 14:4-2; Pennsylvania Business Corporation Law, § 2851-204.⁴ The statutory "principal office" is the place where process may be served and where transfer and stock books must be kept; it is, in other words, the

⁴ Cf. New Jersey Revised Statutes, § 14:4-1: "The terms 'principal office', 'principal office in this state' and 'registered office', wherever used in this title, shall be construed as synonymous terms."

"locale" or "location" of a corporation for the purpose of suit. In enacting venue provisions, including that in Section 19(b) of the Gas Act, Congress was acting against the background of general corporation laws. It is reasonable to assume therefore that when it referred to the place in which a natural gas company is "located", Congress meant the place—the location—specified in the corporate charter.

There is a large body of precedent supporting this view, as is evident from the numerous decisions involving national banks. In *Raiola v. Los Angeles First Nat. Trust & S. Bank*, 133 Misc. 630, 631, 233 N.Y. Supp. 301, which reviews prior federal and state court decisions, the court concluded (233 N.Y. Supp. at 302):

* * * The location of a national banking association is the place specified in its organization certificate. * * *

In *National City Bank of New York v. Domenech*, 71 F. 2d 13 (C.A. 1), the court of appeals held that, although the National City Bank had a branch in Puerto Rico, it was not "located" there. Similarly, in *Leonardi v. Chase Nat. Bank of City of New York*, 81 F. 2d 19, 22, certiorari denied, 298 U.S. 677, the Second Circuit, citing prior authority, held that a national bank is located only in the place named in its charter and not at each of its branches. And more recently, *Buffum v. Chase Nat. Bank of City of New*

* Black's Law Dictionary (4th ed. 1951) p. 1088, adopts this case as the black-letter definition of "located", saying: "A bank is 'located' in the place specified in its organization certificate. * * *

York, 192 F. 2d 58 (C.A. 7), certiorari denied, 342 U.S. 944, reaffirmed the holding of earlier federal and state courts that a national bank may be sued "only in the place of its establishment, i.e., its location" (p. 60). See, also, *International Refugee Organization v. Bank of America*, 86 F. Supp. 884, 886-887 (S.D.N.Y.); *Schmitt v. Tobin*, 15 F. Supp. 35 (D. Nev.). In *Cope v. Anderson*, 331 U.S. 461, 467, this Court observed that

* * * For jurisdictional purposes, a national bank is a "citizen" of *the state* in which it is established or located * * * and in *that district alone* can it be sued. * * * [Emphasis added.]

And only last term, the Court quoted the foregoing statement with approval and endorsed earlier cases which held or assumed that a national bank is "located" only at the single place specified in its charter and not at other places where it might maintain branches or transact business. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 561-562, footnotes 11 and 13."

"In other contexts as well, the word "located", as applied to corporations, has been equated with "domiciled". See e.g., *Carver v. Spring Perch Co.*, 113 Conn. 636, 155 Atl. 832, 834; *Stanton v. State Tax Commission*, 26 Ohio App. 198, 159 N.E. 340, affirmed, 117 Ohio St. 436, 159 N.E. 823; *San Jacinto Nat. Bank v. Sheppard*, 125 S.W. 2d 715 (Tex. Civ. App.). Indeed, *American Jurisprudence* assumes the equivalence of "residence" and "location" as applied to corporations. 13 Am. Jur., Corporations, § 1158, pp. 1073-1074, headed "Residence or Location of Corporation for Purpose of Venue." Throughout the section, the phrase "location or residence" is used with no suggestion of any differentiation between the two nouns. See, also, 18 Corpus Juris Secundum § 177, p. 586.

CONCLUSION

For the foregoing reasons the judgments of the Court of Appeals should be reversed and remanded, with instructions to conduct further proceedings in *Pan American* and to dismiss, for lack of venue in *Texaco*.

Respectfully submitted.

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FEBRUARY 1964.

APPENDIX

1. The Administrative Procedure Act, Section 4, 60 Stat. 238, 5 U.S.C. 1003, provides as follows:

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written

data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **PETITIONS.**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in

rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint,

at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall

give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

SEC. 5. (a). Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717 d(a)]

SEC. 7 * * *

(c) ^(*)No natural-gas company or person which will be a natural-gas company upon com-

^(*)Subsection 7(c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

pletion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending

the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be

filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938) ; 15 U.S.C. § 717e]

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 SEC. 19 • • • • •

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction,

which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new finding, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r]

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3. The rules and regulations of the Federal Power Commission, as amended, 18 C.F.R. (Cum. Supp. 1963), provide in pertinent part as follows:

Section 1.7 * * *

(b) *For issuance, amendment, waiver, or repeal of rules.* A petition for the issuance, amendment, waiver, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, waiver, or repeal requested, and cite by appropriate reference the statutory provision or other authority therefor. If a rate filing is accompanied by a request for waiver pursuant to this section the thirty-day notice period provided in section 4(d) of the Natural Gas Act and section 205(d) of the Federal Power Act shall begin to run if and when the Commission grants the request. Such petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, such rule, amendment, waiver, or repeal, and shall conform to the requirements of §§ 1.15 and 1.16. Petitions for the issuance or amendment of a rule shall incorporate the proposed rule or amendment.

Section 154.93 Rate schedule [for independent producers] defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or

after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes, levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

* * *

Section 157.14 [relates to pipeline application]
Exhibits.

(a) *To be attached to each application.* * * *
all exhibits specified shall accompany each application when tendered for filing.

* * *

(10) *Exhibit H—Total gas supply data.* A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:

* * *

(v) A conformed copy of each gas purchase contract upon which applicant proposes to rely: * * * *Provided further, however,* That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provision other than those defined as permissible in § 154.93 of this chapter. * * *

Section 157.25 Necessary exhibits.

There shall be filed with the application [of a producer] as a part thereof the following exhibits:

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.